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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 970426-CA
v.	:	
MARK ANDERSON,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF

APPEAL FROM A JUDGMENT OF CONVICTION ON 14 COUNTS OF FRAUDULENTLY OBTAINING CONTROLLED SUBSTANCES BY PRESCRIPTION, A THIRD DEGREE FELONY, IN THE FIRST JUDICIAL DISTRICT COURT, CACHE COUNTY, THE HONORABLE CLINT S. JUDKINS PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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Plaintiff-Appellee,	:	Case No. 970426-CA
v.	:	
MARK ANDERSON,	:	Priority No. 2
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v.	:	
MARK ANDERSON,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a judgment of conviction on 14 counts of fraudulently obtaining controlled substances by prescription, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (Supp. 1993), in the First Judicial District Court, Cache County, the Honorable Clint S. Judkins presiding. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1997).

ISSUES PRESENTED ON APPEAL and STANDARDS OF REVIEW

1. Does a statute providing that a physician "cannot, without the consent of his patient, be examined in a civil action," apply in a criminal action?

A trial court's interpretation of a statute is a question of law and thus reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993).

2. Where a person consults physicians for the purpose of fraudulently obtaining controlled substances, are his communications protected by rule 506, Utah Rules of Evidence?

"The existence of a privilege is a question of law for the court, which [this Court will] review for correctness, giving no deference to the trial court's determination." Price v. Armour, 949 P.2d 1251, 1254 (Utah App. 1997) (quoting Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)).

3. Assuming arguendo that the physician-patient privilege otherwise applies, may defendant assert that privilege at trial after having waived it by not objecting to the doctors' testimony in the preliminary hearing?

See standard of review for issue No. 2.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following provisions are reproduced in addendum A:

Utah Code Ann. § 58-17a-604(4)(b) (Supp. 1996);
Utah Code Ann. § 58-37-8(3) (Supp. 1993);
Utah Code Ann. § 78-24-8 (1995);
Utah R. Evid. 506;
Utah R. Evid. 507.

STATEMENT OF THE CASE

Defendant was charged by Amended Information with 20 counts of fraudulently obtaining controlled substances by prescription (R. a-j). At the conclusion of a two-day trial, the jury convicted defendant on 14 counts and acquitted defendant on six counts (R.

68-71, 108-14). Defendant was sentenced to statutory terms, but his sentences were stayed and defendant was placed on probation (see unpaginated Judgment, Sentence, and Commitment). Defendant timely appealed (R. 120-21).

STATEMENT OF FACTS[1]

Motion in Limine

Defendant filed a Motion in Limine Respecting Physician-Patient Privilege (R. 46). The motion sought an "Order limiting the Plaintiff in the presentation of evidence as to testimony by defendant's treating physicians and respecting the records of said treating physician with respect to communications between Defendant and Defendant's treating physicians and impressions gained by Defendant's treating physician in the course of said treatment" (R. 46). The trial court denied defendant's motion in limine to suppress under the physician-patient privilege (R. 150-51).

At the hearing on this motion, the court noted that the statutory privilege found in Utah Code Ann. § 78-24-8 (1995) was expressly limited to civil actions (R. 150-51). With respect to the equivalent court rule, rule 506, Utah Rules of Evidence, the court reasoned that while the rule is not expressly limited to civil actions, applying it in the present context would be inconsistent with Utah

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[1] Except as noted, facts are stated in the light most favorable to the jury's verdict. State v. Dunn, 850 P.2d 1201, 1205-06 (Utah 1993); State v. Verde, 770 P.2d 116, 117 (Utah 1989).

Code Ann. § 58-37-8 (Supp. 1993), which criminalizes the obtaining of controlled substances by misrepresentation or non-disclosure (R. 151).

The court denied defendant's motion and ruled that the State could examine the physicians limited to the areas identified in the prosecutor's memorandum (R. 151, 55-60). This ruling permitted the State to ask the physicians questions such as whether they had prescribed a controlled substance to defendant, whether defendant had disclosed that his primary care physician had already issued a prescription, and whether this information would have caused the physician not to issue the prescription, and "logical extensions" of such questions (R. 57, 115, 151-52). Defendant's motion was granted as to "all other material" (R. 152).

Trial facts

Defendant was treated by his primary care physician, Dr. Lars Bergeson of Logan, Utah, during the period October 1992 through November 1994; Dr. Bergeson prescribed Tussionex, a cough suppressant, and Lortab, a pain reliever (R. 217-26, 236-41). Both are synthetic narcotics (R. 222-25). He also refilled defendant's prescription for Bantus, another narcotic cough medication (R. 229).[2]

Drs. Cory Johnson, Russell Anderson, Douglas Hyldahl, Bruce Isaacson, and Glen Mortensen all testified that, during the same

[2] None of the charges are based on medications prescribed by Dr. Bergeson (R. 224).

period, they all prescribed Tussionex and other controlled substances containing the narcotics hydrocodone or codeine to defendant; that defendant did not inform them that he was receiving the same controlled substances from another source; and that they would not have issued the prescriptions had defendant disclosed this information (see R. 245-93, State's exhibits 8-17).[3]

Records from Payless Pharmacy, Shopko Pharmacy, Wal-Mart Pharmacy, Fred Meyer Pharmacy, Reed's Pharmacy, Spence's North Pharmacy, and Spence's South Pharmacy established that the narcotic medications were dispensed to defendant--the equivalent of more than 50 four-ounce bottles over 11 months (see R. 313-43, 377; State's exhibits 18-24).

When questioning exceeded the limits of the court's order, defendant's objections were sustained (see, e.g., R. 227-28, 231-32, 241, 259).

SUMMARY OF ARGUMENT

Unlike the attorney-client privilege, the physician-patient privilege is a relatively recent innovation. Most legal scholars condemn it and those states which recognize it tend to limit its scope. Defendant here is not entitled to the protections of Utah's physician-patient privilege to shield himself from charges of fraudulently obtaining controlled substances by prescription.

---

[3] Portions of medical records relating to defendant's symptoms or any diagnosis were masked prior to trial, leaving visible only his name, certain dates, and prescription notations (see State's exhibits 5-24).

1. The trial court correctly ruled that admission of the doctors' testimony against defendant did not violate the physician-patient privilege as codified in Utah Code Ann. § 78-24-8 (1995). Defendant's claim fails because the Utah Supreme Court has held that this statute does not apply in criminal cases.

2. a. Defendant's claim that admission of the doctors' testimony violated the physician-patient privilege found in rule 506(b), Utah Rules of Evidence, must also fail. By its own terms, the physician-patient privilege protects only information communicated for the purpose of diagnosing or treating the patient. Accordingly, communications between a patient and physician having a criminal purpose are not protected by the privilege. Defendant's purpose in consulting the doctors was to fraudulently obtain prescriptions for controlled substances, not to seek treatment; therefore, the trial court correctly refused to apply the physician-patient privilege.

b. Defendant's claim that admission of the doctors' testimony violated the physician-patient privilege as codified in rule 506 fails for a second reason. The trial court correctly held that applying rule 506(b) would be inconsistent with Utah Code Ann. § 58-37-8 (Supp. 1993), which criminalizes the obtaining of controlled substances by misrepresentation or non-disclosure. Allowing the defendant to invoke the physician-patient privilege against a charge

of prescription fraud would make this crime impossible to prosecute. Therefore, the trial court correctly refused to apply the privilege.

3. Assuming arguendo the physician-patient privilege had application to this case, defendant waived the privilege by failing to assert it when the physicians testified in the preliminary hearing. Failure to object on privilege grounds constitutes waiver of the privilege. Furthermore, courts generally hold that once the privilege is waived it cannot be reasserted. Accordingly, defendant's failure to assert the privilege when the physicians testified at the preliminary hearing constituted a waiver of the privilege, which cannot be reasserted at trial.

ARGUMENT

Introduction

"For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence." Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). Exceptions to this principle "are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974).

"Testimonial privileges are permitted only to the very limited extent that excluding relevant evidence 'has public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" In re Doe, 711 F.2d 1187, 1193 (2nd Cir.

1983) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)) (internal quotation marks omitted).

Unlike the attorney-client privilege, which dates from the reign of Elizabeth I, no physician-patient privilege existed at common law; it is a "purely statutory innovation." 8 J. Wigmore, Wigmore on Evidence § 2286, at 528, § 2290 at 542, § 2380 at 818-19 (McNaughten rev. 1961); 2 Jack b. Weinstein & Margaret A. Berger, Weinstein's Evidence, ¶ 504[01] at 504-9 (1994).

"Legal scholars have been virtually unanimous in their condemnation of it." Id. See, e.g., 8 Wigmore § 2380a at 831 ("It is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth"); McCormick's Handbook of the Law of Evidence § 105 at 228 (Edward W. Cleary, ed., 1972) ("More than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud").

"[I]n recognition of the privilege's undesirable effects," states which have adopted a general medical privilege "have whittled away at the privilege so that its scope has been considerably reduced." 2 Weinstein ¶ 504[1] at 504-10.

No federal physician-patient privilege exists, although the United States Supreme Court recently adopted a psychotherapist-patient privilege. See Jaffee, 116 S. Ct. at 1931. In justifying this privilege, the Court noted that psychotherapy requires disclosure

of "facts, emotions, memories, and fears." Id. at 1928. In contrast, "[t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests." Id.

Both the Utah Code and the Utah Rules of Evidence recognize the physician-patient privilege. See Utah Code Ann. § 78-24-8 (4) (1995); Utah R. Evid. 506. Defendant relies on both.

POINT I

BY ITS PLAIN LANGUAGE, THE STATUTORY PHYSICIAN-PATIENT PRIVILEGE IS LIMITED TO CIVIL ACTIONS

Defendant claims that admission of the doctors' testimony violated the physician-patient privilege as codified in Utah Code Ann. § 78-24-8 (1995).

Utah Code Ann. § 78-24-8 (4) (1995) provides in pertinent part (emphasis added): "A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

Defendant's contention fails because the Utah Supreme Court has held that this statute does not apply in criminal cases. State v. Dean, 69 Utah 268, 272-73, 254 P. 142, 143 (Utah 1927); see Br. Aplt. at 11. Indeed, given the statute's plain language, a court could hardly conclude otherwise. See O'Keefe v. Utah State Retirement

Bd., 929 P.2d 1112, 1115 (Utah Ct. App. 1996); Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 520 (Utah 1997).

Defendant asserts that section 78-24-8 "should be construed liberally to afford defendant due process; the distinction made by the legislature is invidious and has no rational basis." Br. Aplt. at 7. Because this assertion is supported by neither authority nor analysis, it must be rejected. See State v. Wareham, 772 P.2d 960, 966 (Utah 1989); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Farrow, 919 P.2d 50, 53 n.1 (Utah App. 1996); State v. Streeter, 900 P.2d 1097, 1100 n.3 (Utah App. 1995), cert. denied, 913 P.2d 749 (Utah 1996); State v. Jennings, 875 P.2d 566, 569 n.3 (Utah App. 1994); Utah R. App. P. 24(a)(9).

POINT II

WHERE A PERSON CONSULTS PHYSICIANS FOR THE PURPOSE OF FRAUDULENTLY OBTAINING CONTROLLED SUBSTANCES, HIS COMMUNICATIONS WITH THOSE PHYSICIANS ARE NOT PROTECTED BY RULE 506, UTAH RULES OF EVIDENCE

Defendant claims that admission of the doctors' testimony violated the physician-patient privilege found in rule 506(b), Utah Rules of Evidence. Br. Aplt. at 7.

Rule 506 reads in pertinent part:

> (b) General rule of privilege. If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information

transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist . . .

(d) Exceptions. No privilege exists under this rule:

(1) Condition as element of claim or defense. As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, . . .

A. Defendant is not entitled to the protection of the rule because the purpose of his visits was not to seek treatment, but to fraudulently obtain drugs.

The scope of a privilege "is limited by its underlying purpose." State v. Forshee, 611 P.2d 1222, 1224 (Utah 1980) (construing forerunner of Utah R. Evid. 505, Government informer privilege). By its own terms, the physician-patient privilege protects only information communicated "for the purpose of diagnosing or treating the patient." Utah R. Evid. 506(b). It follows that the privilege may not be claimed by a person who consults a physician for a purpose other than diagnosis or treatment. Moutzoukos v. Mutual Benefit Health & Accident Ass'n, 69 Utah 309, 318, 254 P. 1005 (Utah 1927) (error to exclude information obtained by physician in employer-required pre-employment examination).

This reasoning applies with particular force if the purpose of the "patient" was criminal. "Communications between a patient and a physician having for their object the commission of a crime are not within the physician-patient privilege." 81 Am.Jur. Witnesses

§ 482 (1992). "If the patient's purpose in the consultation is an unlawful one, as . . . to obtain narcotics in violation of law, . . . the law withholds the shield of privilege." McCormick's Handbook of the Law of Evidence § 99 at 215 (Edward W. Cleary, ed., 1972). See also 3 Jones on Evidence (6th ed.) § 21.29 at 823 ("[c]ommunications between physician and patient, however confidential they may be, are held not to be privileged if they have been made in the furtherance of an unlawful or criminal purpose"). "In such cases [the physician-patient privilege] has no public policy or social value." Green v. State, 274 N.E.2d 267, 273 (Ind. 1971).

In keeping with the foregoing principles, courts generally refuse to allow the privilege to be invoked by those accused of obtaining drugs by manipulating their doctors. For example, State v. Garrett, 456 N.E.2d 1319, 1320 (Ohio App. 1983), involved a patient who obtained a prescription for sleeping pills, then two days later obtained a second prescription by falsely claiming that the first prescription had been stolen. The physician testified that if he had known that the first prescription had not in fact been stolen, he would not have written the second. Id.

The Ohio Court of Appeals affirmed, noting that defendant sought the services of his doctor, "not as a result of a disease or disorder suffered by defendant, but, rather, for the obtaining of an illegal drug by the use of false statements to the physician." Id. at 1319. Thus, it held, the statutory physician-patient privilege "does not

make inadmissible the testimony of a physician regarding false statements made to said physician by a person seeking a prescription for an illegal drug where there is no evidence that the drug was obtained by said person for the treatment of any medical illness, disease or disorder." Id. at 1322.

To the same effect is State v. Thomale, 317 N.W.2d 147 (S.D. 1982). There, the defendant claimed he had lost his medication and requested his doctor to write a prescription for the medication. Id. at 148. The court affirmed, stating, "Since the statements made by defendant to [the doctor] were made for the purpose of obtaining possession of controlled substances rather than to cure or alleviate an illness, the conversation was not privileged . . ." Id. See also Finney v. State, 623 S.W.2d 847, 848 (Ark. App. 1981) (physician-patient privilege does not bar doctor's testimony in trial on prescription forgery charge); Sharp v. State, 569 N.E.2d 962, 965 (Ind. App. 1991) ("We hold that when . . . the patient on whose behalf a prescription is written is a defendant in a criminal prosecution involving the prescription, the prescription is not privileged"); but see People v. Sinski, 669 N.E.2d 809(N.Y. 1996).

These principles apply here. Although all six doctors did diagnose and treat defendant (who was in fact ill), nevertheless, his purpose in consulting them was to fraudulently obtain controlled substances. Any one of the six might have legitimately prescribed a single narcotic and, in fact, defendant was not charged in

connection with Dr. Bergeson's initial prescriptions (R. 232-33). Defendant's purpose in consulting multiple doctors was criminal, not medical.

The policy of the physician-patient privilege is to "encourage and permit the patient freely to impart to the doctor any information which is necessary, or will be helpful, to the physician in prescribing or acting for the patient." Clawson v. Walgreen Drug Co., 162 P.2d 759, 770 (Utah 1945) (Larson, C.J., concurring and dissenting). To permit defendant, under the cloak of the privilege, to affirmatively mislead physicians would offend both the policy of the privilege and the language of rule 506(b). For this reason, his rule 506 claim should be rejected.

B. Defendant's broad reading of rule 506 would effectively nullify the prescription fraud statute.

Defendant's rule 506 claim fails for a second reason. The trial court ruled that applying rule 506(b) in the context of this case would be inconsistent with Utah Code Ann. § 58-37-8 (Supp. 1993), which criminalizes the obtaining of controlled substances by misrepresentation or non-disclosure (R. 151). The court was correct: permitting a defendant to invoke the physician-patient privilege against a charge of prescription fraud would render the crime impossible to prosecute. In effect, the court ruled that defendant's statements to the doctors proved "an element of any claim or defense," and thus fell within the rule's exception. See Utah R. Evid. 506(d).

Utah Code Ann. § 58-37-8(3)(a)(ii) (Supp. 1993) reads in pertinent part: "It is unlawful for any person knowingly and intentionally: . . . to obtain a prescription for . . . any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source . . ."

This statute does not criminalize obtaining multiple prescriptions, but obtaining any prescription by misrepresentation or fraudulent non-disclosure. Therefore, the prosecution cannot establish its case through pharmaceutical records alone; the doctor must testify to the patient's fraudulent communications. To hold the physician-patient privilege applicable in such cases would effectively grant immunity to all perpetrators of this crime.

The Michigan Court of Appeals drew a similar conclusion in People v. Johnson, 314 N.W.2d 631 (Mich. App. 1981). Suffering from acute bronchitis, defendant consulted his physician, who prescribed fifteen tablets of pentazocine, a controlled substance. Id. at 632. However, before filling the prescription, defendant altered the prescription, changing the "15" to a "45." Id. He was prosecuted for obtaining a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. Id.

The court of appeals ruled the physician-patient privilege was not available on these facts. "The prescription could only be verified by the physician who issued it. Without the doctor's

testimony, convictions for forgeries of prescriptions would be well-nigh impossible." Id. at 634.

"Like statutes, court rules are construed to avoid absurd results." State v. Kelly, 808 P.2d 1150, 1153 (Wash. App. 1991). They should also be construed "to the end that the truth may be ascertained and proceedings justly determined." Utah R. Evid. 102. Construing the physician-patient privilege in a manner to effectively nullify a substantive criminal statute would not serve these ends. The trial court correctly refused to do so here.

POINT III

DEFENDANT'S FAILURE TO OBJECT TO THE DOCTORS' TESTIMONY AT HIS PRELIMINARY HEARING WAIVED ANY OTHERWISE APPLICABLE PHYSICIAN-PATIENT PRIVILEGE AT TRIAL

Assuming arguendo that the physician-patient privilege applied here, defendant waived the privilege by failing to assert it when the doctors testified in his preliminary hearing.

In opposing defendant's motion to suppress at trial, the prosecutor argued that defendant had already waived any physician/patient privilege by not objecting when his physicians testified in the preliminary hearing: "once waived, always waived" (R. 146-48). Defense counsel argued that he had objected, but that his objection had been overruled (R. 147). The prosecutor did not recall that an objection based on privilege had been lodged (R. 147).

The trial court rejected the State's argument, ruling that non-objection at the preliminary constituted waiver "as far as that

hearing was concerned, but would not be effective at subsequent hearings" (R. 150). However, it added, "If I'm wrong on that I'd like an appellate court to so advise me" (id.). The trial was in fact wrong on this point.

At the preliminary hearing, Drs. Russell Anderson, Cory Johnson, Bruce Isaacson, Glenn Mortensen, Douglas Hyldahl, and Lars Bergeson all testified without objection on the ground of physician-patient privilege (see R. 403: 6-83). These are the same doctors who testified at trial (see R. 216-93).

The physician-patient privilege may of course be waived. Clawson v. Walgreen Drug Co., 162 P.2d 759,763 (Utah 1945). Failure to object to evidence on privilege grounds constitutes waiver of the privilege. See State v. Scott, 491 S.W.2d 514, 519 (Mo. 1973) (en banc); Hughson v. St. Francis Hosp. of Port Jervis, 463 N.Y.S.2d 224, 230 (N.Y. Sup. Ct. App. 1983); Frias v. State, 722 P.2d 135, 140 (Wyo. 1986); McCormick § 102; 81 Am.Jur. Witnesses § 511 (1992).

Furthermore, courts generally hold that "once waived, whether at a former trial or otherwise, a patient cannot reassert his or her privilege." State v. Mincey, 687 P.2d 1180, 1194 (Az.), cert. denied, 469 U.S. 1040 (1984); In re Grand Jury Proceedings, 604 F.2d 804, 805 (3d Cir. 1979); Novak v. Rathnam, 478 N.E.2d 1334, 1337 (Ill. 1985); Hamilton v. Verdow, 414 A.2d 914, 919 (Md. App. 1980); State v. Bishop, 453 A.2d 1365, 1368 (N.J. App. 1982); State v. Smith, 929 P.2d 1191, 1197 (Wash App. 1997); Commonwealth v. Santiago, 662

A.2d 610, 614-15 (1995), cert. denied, 516 U.S. 1053 (1996); but see Johnson, 314 N.W.2d at 633.

Thus Wigmore writes that "the original disclosure [of privileged information] takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only." 8 J. Wigmore, Wigmore on Evidence § 2389, at 860-61 (McNaughten rev. 1961) (emphasis omitted).

Similarly, a popular dictum observes that "when a secret is out, it is out for all time, and cannot be caught again like a bird, and put back in its cage." People v. Al-Kanani, 307 N.E.2d 43 (N.Y. 1973) (citations omitted), cert. denied, 417 U.S. 916 (1974). Thus, to resuscitate the privilege after its waiver "would simply be an obstruction to public justice." Id.

Accordingly, defendant's failure to assert the privilege when the doctors testified at his preliminary hearing constituted a waiver as to trial as well. The trial judge's ruling on this point was mistaken and this Court may, in his words, "so advise [him]" (R. 150) by affirming on this alternative ground. See State v. South, 924 P.2d 354 (Utah 1996).

CONCLUSION

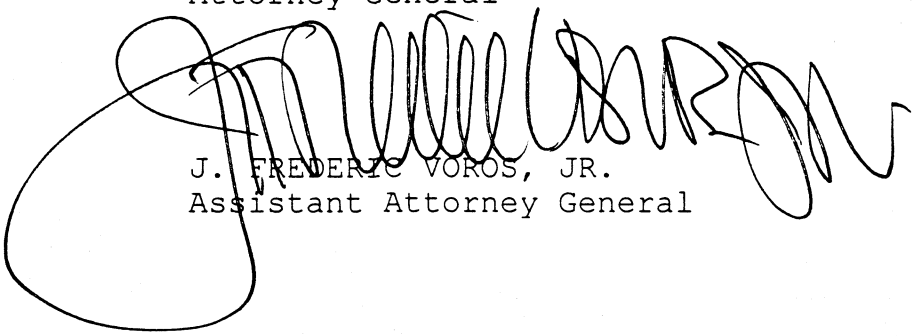
Defendant's convictions should be affirmed.

ORAL ARGUMENT and PUBLISHED OPINION

Because this case presents novel issues of law, the State requests that oral argument be held and that a published opinion issue.

RESPECTFULLY submitted on 8 July 1998.

JAN GRAHAM
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first-class mail this 8 July 1998 to the following:

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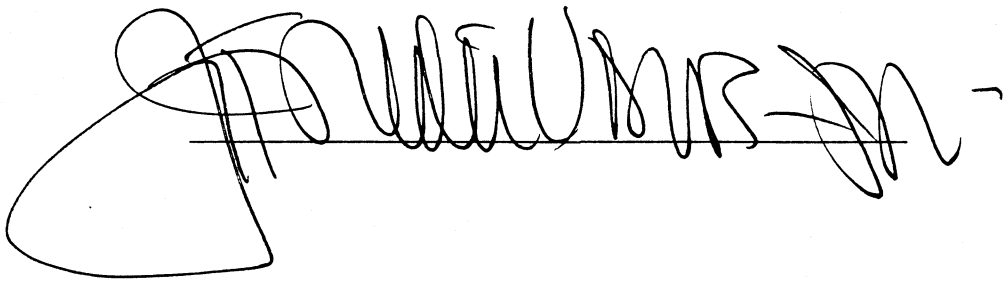

ADDENDUM

Relevant statutes and rules

58-17a-604. Medication profiles.

(1) (a) Each pharmacy shall establish a medication profile system for pharmacy patients according to standards established by division rules made in collaboration with the board.

(b) The rules shall indicate the method for recording all prescription information.

(2) The pharmacy shall maintain the medication profile for any pharmacy patient who expresses a desire for that professional service.

(3) The pharmacy may charge an appropriate professional fee for this service and for copying or providing information in the medication profile to another authorized person.

(4) A pharmacist, pharmacy intern, or pharmacy technician may not release or discuss the information contained in a prescription or patient's medication profile to anyone except:

(a) the pharmacy patient in person or the pharmacy patient's legal guardian or designee;

(b) a lawfully authorized federal, state, or local drug enforcement officer;

(c) a third party payment program administered under terms authorized by the pharmacy patient;

(d) a pharmacist, pharmacy intern, or pharmacy technician providing pharmacy services to the patient or a prescribing practitioner providing professional services to the patient;

(e) another pharmacist, pharmacy intern, pharmacy technician, or prescribing practitioner to whom the patient has requested a prescription transfer; or

(f) the pharmacy patient's attorney, after the presentation of a written authorization signed by the:

(i) patient, before a notary public;

(ii) parent or lawful guardian, if the patient is a minor;

(iii) lawful guardian, if the patient is incompetent; or

(iv) personal representative, if the patient is deceased.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this

chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(f) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than $5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark,

trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-18-1, may if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to ½ the maximum sentence imposed by law for the offense committed.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence, the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court, the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

78-24-8. Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) (a) Neither a wife nor a husband may either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage.

(b) This exception does not apply:

(i) to a civil action or proceeding by one spouse against the other;

(ii) to a criminal action or proceeding for a crime committed by one spouse against the other;

(iii) to the crime of deserting or neglecting to support a spouse or child;

(iv) to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse; or

(v) if otherwise specifically provided by law.

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in his capacity as an employee.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

(4) A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

(5) A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

(6) A sexual assault counselor as defined in Section 78-3c-3 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 78-3c-3 made by the victim.

Rule 506. Physician and mental health therapist-patient.

(a) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) "Mental health therapist" means a person who is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor while that person is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addition.

(b) *General rule of privilege.* If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) *Exceptions.* No privilege exists under this rule:

(1) *Condition as element of claim or defense.* As to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense, or, after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) *Hospitalization for mental illness.* For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(3) *Court ordered examination.* For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

(Amended effective July 1, 1994.)

Rule 507. Miscellaneous matters.

(a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

(b) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was

(1) compelled erroneously or

(2) made without opportunity to claim the privilege.

(c)(1) *Comment or inference not permitted.* The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) *Jury instruction.* Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to instruction that no inference may be drawn therefrom.

(4) *Exception.* In a civil action, the provisions of subparagraph (c) do not apply when the privilege against self-incrimination has been invoked.